



Robert W. Quinn, Jr.
Federal Government Affairs
Vice President

Suite 1000
1120 20th Street NW
Washington DC 20036
202 457 3851
FAX 202 457 2545

June 18, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, N.W.
Room TWB-204
Washington, D.C. 20554

Re: Application by Qwest Communications International, Inc. for Authorization to
Provide In-Region, InterLATA Services in the state of Minnesota
WC Docket No. 03-90

Dear Ms. Dortch:

On behalf of AT&T Corp. ("AT&T"), I am writing to advise that Qwest's discriminatory provisioning of UNE-Star resale services and the adverse effects upon competitive local exchange carriers ("CLECs") in Minnesota are continuing unabated. AT&T believes that unless and until Qwest's misconduct is remedied, Qwest must not be permitted to provide in-region, interLATA services in Minnesota.

The misconduct at issue arises out of special resale provisioning arrangements made to broker the silence of Eschelon and McLeod, the two largest CLECs in Minnesota. Eschelon and McLeod have long been unable to utilize Qwest's unbundled network element platform ("UNE-P") to provide service to their customers.¹ Accordingly, both Eschelon and McLeod had been vocal opponents in Qwest's Minnesota section 271 proceedings. That opposition abruptly ceased when Qwest offered UNE-Star exclusively to Eschelon and McLeod. In proceedings instituted by the state's Department of Commerce to investigate Qwest's unfiled agreements, the ALJ concluded that Qwest had purchased the silence of these CLECs in order to remove any

¹ Eschelon and McLeod began operating in the state of Minnesota as resellers. In the year 2000, Eschelon and McLeod attempted to migrate their existing resale customers to Qwest's UNE-P. The resulting outages and failures proved to be intolerable. See Findings of Fact, Conclusions of Law, and Recommendations, *In the Matter of a Commission Investigation into Qwest's Compliance with Section 271(c)(2)(B) of the Telecommunications Act of 1996; Checklist items 1, 2, 4, 5, 6, 11, 13, and 14*, Docket No. P-421/CI-01-1371 (January 28, 2003) ("ALJ's January 28, 2003 Decision"), at paras. 89-90. See also, Qwest's Minnesota Section 271 Application, Appendix K, Vol. 3, Tab 317.

obstacles to the MNPUC's approval of Qwest's section 271 application.² The MNPUC agreed with the ALJ's findings, stating that "[t]he record in the unfiled agreements proceeding demonstrates that *Qwest knowingly chose to act in an anti-competitive manner, for the specific purpose of buying the Section 271 silence of the two largest CLECs in Minnesota.*"³

The "UNE-Star" service provided to Eschelon and McLeod is a misnomer. UNE-Star is neither a "platform" nor a true unbundling of Qwest's network elements.⁴ Qwest simply resells local services to Eschelon and McLeod, billing these CLECs the resale price of their respective lines. Qwest then performs a separate manual billing adjustment, discounting the price of the resold lines to the TELRIC pricing equivalent for UNE-P.⁵ To date, both Eschelon and McLeod have continued to utilize UNE-Star, because Qwest has yet been unable to convert the end user customers of these CLECs to UNE-P without causing them to experience an inordinate number of outages or other service failures.⁶ As a consequence, the customers of these favored CLECs have received and continue to receive resold services.⁷

UNE-Star, as it has been provided and continues to be provided to Eschelon and McLeod, can only be viewed as a discounted resale service that is not generally available in its current form to any other carrier in the state.⁸ The continued reliance of Eschelon and McLeod upon UNE-Star make it clear that Qwest is discriminating on an ongoing basis against the other CLECs in Minnesota, who do not have access to this service. UNE-Star does not appear in Qwest's SGAT. It is not made available to other carriers by means of Qwest's website.⁹ Because it utilizes cost-based pricing instead of "avoided cost" pricing, UNE-Star is discounted substantially below other resale services. UNE-Star thus provides a price break for resale

² See Findings of Fact, Conclusions, Recommendation and Memorandum, *Complaint of the Minnesota Department of Commerce Against Qwest Corporation Regarding Unfiled Agreements*, Minnesota Public Utilities Commission, Docket No. P-421/C-02-197 (September 20, 2002) ("ALJ's September 2002 Decision") (annexed as Attachment 1 to AT&T Qwest III Comments) at para. 376.

³ MNPUC Comments, at 35 (emphasis in original). See also, *id.* ("Qwest purposely cheated for the direct and specific purpose of obtaining 271 approval"); *id.* at 34 ("Qwest attempted to cheat its way to 271 approval.").

⁴ A description of UNE-Star is found in the ALJ's January 28, 2003 Decision, at paras. 89-101. UNE-Star was first offered to Eschelon in November 2000 as part of a group of transactions that later formed the basis for the Minnesota Department of Commerce's complaint concerning unfiled secret agreements. See MNPUC Docket No. P-421/C-02-197; ALJ's January 28 Decision, at para. 90.

⁵ ALJ's January 28, 2003 Decision, at para. 90.

⁶ In the Arizona Corporation Commission's Section 271 proceeding, Eschelon described numerous impediments to the conversion of the customer base for Eschelon's existing UNE-Star service (known as "UNE-E" for Eschelon) to a mechanized billing system. See Eschelon's Reply to Qwest's "Comments of Eschelon" Regarding UNE-E mechanization and Accurate Billing, filed April 30, 2003, in ACC Docket No. T-000000A-97-0238, at 6-11. The Eschelon document is annexed to AT&T Reply Comments as Attachment 1.

⁷ *Id.* at paras. 89, 97. The adverse impact of the secret deals went beyond marketplace distortions to contaminate the record itself. The MNPUC and the ALJ found that Qwest's data on DUF accuracy were unreliable because Qwest had used a manual process to provide usage information for UNE-Star, rather than the ordinary process for generating and transmitting DUFs. In addition, the ALJ found that Qwest's data on billing accuracy improperly excluded the manual adjustments that were made in the course of billing for UNE-Star service. See Comments of AT&T, at 22, and footnote 71; Finnegan Decl. para. 50.

⁸ See MNPUC Comments, at 33.

⁹ Indeed, the Minnesota ALJ found that "...UNE-Star has never been formalized as an offering to other CLECs. UNE-Star is a non-standard arrangement with poorly implemented procedures, bypassing Qwest's standard and documented processes. The product remains undefined and ambiguous. Robert Stright, who headed the Liberty Consulting performance measure audit and data reconciliation processes, testified at hearing that 'I don't know what UNE-Star is' and that UNE-M and UNE-E are 'terms I'm not familiar with.'" ALJ's January 28, 2003 Decision, at para 91.

services that is not generally available to other resellers. Rather than acknowledge and address this ongoing discrimination, Qwest has dissembled, and has even gone so far as to deny that UNE-Star service exists.¹⁰

UNE-Star indeed exists, and it is offered in a discriminatory fashion exclusively to Eschelon and McLeod. The MNPUC has concluded that Qwest's discriminatory practices preclude any finding that Qwest complies with the competitive checklist or that its application is in the public interest. With respect to checklist item 14 (resale), the MNPUC has determined that Qwest's violations are continuing with respect to UNE-Star, and that Qwest cannot be found to have met the requirements of checklist item 14 unless and until it has implemented the remedial measures ordered by the MNPUC in the Unfiled Agreements case.¹¹ As Commissioner Reha stated, "The Unfiled Agreements case shows that Qwest has not corrected its price and service discrimination. I am convinced that Qwest cannot be found to have met the provisions of Checklist Item #14 until it has implemented the remedial measures ordered by the MNPUC."¹² Qwest has refused to do so.

Because it has concluded that Qwest cannot satisfy either the competitive checklist or the public interest requirement, the MNPUC has taken the wholly unprecedented step of filing comments with this Commission recommending that Qwest's section 271 application be denied. As the MNPUC noted in its comments, the robust record in this proceeding makes it clear that Qwest has not and cannot demonstrate compliance with the competitive checklist:

"A review of the record developed in Minnesota should satisfy the Commission that the MNPUC has fully performed its investigative and review functions under the Act. Our determination that Qwest has failed to meet its burden of proving compliance with Section 271 is based upon a well-developed and robust record. Unlike in other states where commissions did not or could not find Qwest's conduct in violation of the public interest, the Minnesota record fully supports a finding that Qwest has not satisfied checklist items 2 and 14 nor met the public interest requirements necessary for approval of its §271 application in Minnesota."¹³

In Minnesota, unlike any other state in which Qwest has sought to provide in-region interLATA service, the record shows beyond dispute that Qwest has engaged in misconduct of a willful, knowing, and—most importantly—*continuing* nature.¹⁴ Qwest's misconduct is not a matter of conjecture or speculation. It is a matter of fact, proven on the record, and continuing unabated to this day.

¹⁰ See *Id.* ("Qwest offered testimony in the UNE costs/pricing 271 docket (PUC Docket No. P-421/CI-01-1375) stating "we don't have a product anywhere called UNE-Star.")

¹¹ These remedial measures include payment of the fine imposed by the MNPUC, making 26 specified provisions of the unfiled agreements available to CLECs, and providing the equivalent of a 10 percent discount on certain Minnesota products and services to CLECs disadvantaged by the unfiled agreements. To date, Qwest has refused to comply with these requirements.

¹² See MNPUC Comments, at 26 (Separate Comments of Comm'r Reha). See also, Separate Comments of Comm'rs Scott and Johnson, in *id.*, at 33.

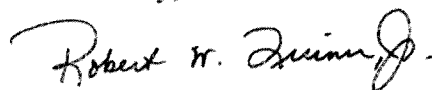
¹³ MNPUC Comments, at 31.

¹⁴ MNPUC Comments, at 26. ("The Unfiled Agreements case also shows that Qwest has not corrected its price and service discrimination.")

In its prior orders, the Commission has relied on the relevant state commission's findings, recommendations and proposed remedies for Qwest's secret deals misconduct, concluding that "concerns about any potential ongoing checklist violation (or discrimination) are met by Qwest's submission of agreements to the commissions of the application states pursuant to section 252, and by each state acting on Qwest's submission of those agreements."¹⁵ No such conclusion can be reached here. The MNPUC has found that Qwest has failed to comply with the non-discrimination and resale provisions of the checklist; that Qwest has failed to submit (or even acknowledge the existence of) agreements relating to UNE-Star; that Qwest has failed to comply with the remedies imposed by the state commission; and that such failure to comply continues unabated to this day. In these circumstances, applying the standards established by the Commission in its previous decisions requires the Commission to reject rather than to approve Qwest's current application.

For these reasons, Qwest's application for interLATA authority in Minnesota must be denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert H. Remondino". The signature is fluid and cursive, with a large initial 'R' and a distinct 'J' at the end.

cc: Gail Cohen
Janice Myles
Gary Remondino

¹⁵ See *Qwest 9-State 271 Order*, paras. 471, 486-87. See also, *Qwest 3-State 271 Order*, paras. 124, 127, 135.